(32) (31)
NOV 2 0 2006

**Nos. 06-340 and 06-549**

IN THE

# Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*
*Petitioners,*

v.

DEFENDERS OF WILDLIFE, *et al.*
*Respondents.*

---

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
*Petitioner,*

v.

DEFENDERS OF WILDLIFE, *et al.*
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

---

## BRIEF OF *AMICUS CURIAE* AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

---

ELLEN STEEN
*Counsel of Record*
THOMAS R. LUNDQUIST
KIRSTEN L. NATHANSON
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2500

*Attorneys for American Farm Bureau Federation*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... i

INTEREST OF *AMICUS CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 3

REASONS FOR GRANTING THE PETITION ..... 3

CONCLUSION ..... 19

## TABLE OF AUTHORITIES

**Cases**

*Am. Forest & Paper Ass'n v. United States Envtl. Prot. Agency*, 137 F.3d 291 (5th Cir. 1998) ..... 8, 12

*Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) ..... 11

*Auer v. Robbins*, 519 U.S. 452 (1997) ..... 9

*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) ..... 10

*Conservation Law Found. v. Andrus*, 623 F.2d 712 (1st Cir. 1979) ..... 8

*Defenders of Wildlife v. United States Envtl. Prot. Agency*, 882 F.2d 1294 (8th Cir. 1989) ..... 8

*Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004) ..... 9, 10

*Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) ..... 5

*Florida Key Deer v. Brown*, 386 F. Supp. 2d 1281 (S. D. Fla. 2005), *appeal pending*, No. 05-16374-II (11th Cir.) ..... 6

*Forsham v. Harris*, 445 U.S. 169 (1980) ..... 11

*Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) ..... 14

*Ground Zero for Non-Violent Action v. United States Dep't of Navy*, 383 F.3d 1082 (9th Cir. 2004) ..... 7

*In re Operation of the Missouri River Sys. Litig.*, 421 F.3d 618 (8th Cir. 2005) ..... 8

*Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 2000) ..... 6

*Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782 (9th Cir. 2005) ..... 17

*Natural Res. Def. Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998) ..... 17

*Natural Res. Def. Council v. United States Envtl. Prot. Agency*, 859 F.2d 156 (D.C. Cir. 1988) ..... 12

*O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995) ..... 6

*Platte River Whooping Crane Habitat Maintenance Trust v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27 (D.C. Cir. 1992) ..... 5, 8, 18

*Public Citizen v. Dep't of Transp.*, 316 F.3d 1002 (9th Cir. 2003) ..... 10, 12

*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) ..... 18

*Rapanos v. United States*, 126 S. Ct. 2208 (2006) ..... 15

*Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004) ..... 8

*Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985) ..... 6, 8

*Save the Bay, Inc. v. United States Army Corps of Eng'rs*, 610 F.2d 322 (5th Cir. 1980) ..... 12

*Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995) ..... 5

*Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ..... 15

*Strahan v. Linnon*, 967 F. Supp. 581 (D. Mass. 1997), *aff'd*, 187 F.3d 623, 1998 WL 1085817 (1st Cir. 1998) ..... 6, 8

*Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) ..... 17, 18, 19

*United States Dep't of Interior*, 2006 WL 2469119 (W.D. Wash. Aug. 24, 2006) ..... 14, 16

*United States v. Mead*, 533 U.S. 218 (2001) ..... 9

*United States v. Orleans*, 425 U.S. 807 (1976) ..... 11

*Washington Toxics Coal. v. United States Envtl. Prot. Agency*, 413 F.3d 1024 (9th Cir. 2005) ..... 7, 15, 16

*Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105 (9th Cir. 2000) ..... 12

**Statutes and Regulations**


Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*:

16 U.S.C. § 1536 (§ 7) ..... passim

16 U.S.C. § 1538 (§ 9) ..... 8

Federal Insecticide, Fungicide, and Rodenticide Act , 7 U.S.C. 136 *et seq.*:

7 U.S.C. § 136(l) ..... 15

7 U.S.C. § 136d(c) ..... 15

Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1251 *et seq.*:

33 U.S.C. § 1342(b) ..... 12, 18

33 U.S.C. § 1362(14) ..... 1

40 C.F.R. § 122.23 ..... 1

50 C.F.R. § 17.95 ..... 14

50 C.F.R. § 17.96 ..... 14

50 C.F.R. § 402.03 ..... 3, 5, 9

50 C.F.R. § 402.13 ..... 16

69 Fed. Reg. 47,732 (Aug. 5, 2004) ..... 16

**Other Authorities**

J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, 16 NAT. RESOURCES & ENV'T 70 (ABA Fall 2001) ..... 11

James Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law About Imposing ESA Responsibility fr Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 ENVTL. L. 595, 623-28 (2003) ..... 11

Jan Hasselman, Holes in the Endangered Species Act Safety Net: The Role of Agency "Discretion" in Section 7 Consultation, 25 STAN. ENVTL. L. J. 125 (2006) ..... passim

Jonathan Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377 (2005) ..... 10

Shannon Petersen, *Endangered Species in the Urban Jungle: How the ESA Will Reshape American Cities*, 19 STAN. ENVTL. L. J. 423, 438-54 (2000) ..... 11

Sherry Bosse, *Defenders of Wildlife v. EPA: Testing the Boundaries of Federal Agency Power under the ESA*, 35 ENVTL. L. 1025 (2006) ..... 4, 5, 9

Valerie Brader, *Shell Games: Vicarious Liability of State and Local Governments for Insufficiently Protective Regulations Under the ESA*, 45 NAT. RESOURCES J. 103 (2005) ..... 11

## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* American Farm Bureau Federation ("AFBF") is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF represents more than five million member families through member organizations in all 50 States and Puerto Rico.

AFBF members are directly affected by the issues presented in the Petitions filed by Federal Defendants/ Petitioners in No. 06-549 ("Fed. Pet."), and by Intervenor-Defendants/Petitioners in No. 06-340 ("NAHB Pet."). Some of AFBF's members operate poultry or livestock farms subject to Clean Water Act ("CWA") Section 402 National Pollutant Discharge Elimination System ("NPDES") regulation as "concentrated animal feeding operations." *See* 33 U.S.C. § 1362(14); 40 C.F.R. § 122.23 (CWA statutory and regulatory provisions addressing concentrated animal feeding operations). These members therefore share the interest of other NPDES-regulated entities in maintaining the current system – threatened by the ruling below – in which State-issued NPDES permits do not trigger Endangered Species Act ("ESA") Section 7 compliance obligations. *See*

---

[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than AFBF, its members, and its counsel made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief. All petitioners other than the United States Environmental Protection Agency ("EPA") submitted letters to the Court consenting to the filing of all *amicus curiae* briefs in this matter. Petitioner EPA, which filed a separate petition for writ of *certiorari*, has provided written consent to AFBF to file this brief. That written consent has been filed with the clerk.

Brief of *Amicus Curiae* Federal Water Quality Coalition in Support of Petitions for Writ of Certiorari at 1-3.

More broadly, many AFBF members rely in some way on a wide array of federal government programs or services that are also threatened by the reasoning of the decision below. By ruling that ESA Section 7(a)(2) constitutes an overriding legal constraint applicable to every federal agency action – regardless of contrary provisions in the agency's organic laws – the Ninth Circuit's decision undermines the ability of federal agencies to act (let alone act promptly) under a myriad of programs in which they have been directed by Congress to issue any manner of permit, license, approval, certification, loan, grant, insurance, or compensation, or to provide any other government service (*e.g.* assistance with the design and implementation of farm conservation and other management practices). Given the breadth of the panel's interpretation of ESA Section 7 and the sweeping applicability of its reasoning to *any and every* federal agency action, the ruling is quite literally of concern to all individuals and businesses – including America's farmers and ranchers – that interact with any federal agency or program. AFBF submits this brief to urge the Court to review the ruling below and resolve these important legal issues.

## SUMMARY OF ARGUMENT

The divided opinion below[2] clearly warrants review under the considerations traditionally applied by this Court and as stated in Rule 10. The questions presented concern recurring issues of broad significance on which there are mature circuit conflicts. This Court's guidance is urgently needed because the Ninth Circuit's view, as expressed in the ruling below, has grave consequences for a wide variety of beneficial federal programs and productive private land uses.

## REASONS FOR GRANTING THE PETITION

1. The principal question presented is whether ESA Section 7(a)(2): (1) is a supplemental provision that operates within the confines of a federal agency's authority under its organic laws as enacted by Congress (which is the view of the United States, the view expressed in 50 C.F.R. § 402.03, and the view of most lower courts); or (2) is an overriding constraint, and font of new authority, applicable to every federal agency action (the majority view of the split Ninth Circuit panel below). *See* Fed. Pet. at I, 9-21; NAHB Pet. at i, 11-22. Federal petitioners (at 21) briefly describe that resolution of this question has great significance to a wide range of federal programs. Amicus expands on that significance below.

The significance of the ruling below extends far beyond the CWA. Many federal statutes direct federal agencies to issue permits, licenses, approvals, loans, grants, insurance, or compensation if a prescribed set of standards is satisfied.

---

[2] *Defenders of Wildlife v. United States Envtl. Prot. Agency*, 420 F.3d 946, 961 (9th Cir. 2005), *rehearing denied*, 450 F.3d 394 (9th Cir. 2006) ("*Defenders*") (Fed. Pet App. 1a-67a, 68a-92a).

Under the panel majority's ruling, however, *no such action* can be taken: (1) procedurally, until the federal agency completes a process of "consultation" with the U.S. Fish and Wildlife Service or National Marine Fisheries Service (the "Services") pursuant to ESA Section 7(a)(2); and (2) substantively, if taking the action as directed by Congress under another statute is likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. *Defenders*, 420 F.3d at 961-69 (Fed. App. 26a-44a).

The court below ruled that ESA Section 7(a)(2) operates as an overriding legal constraint on every action taken, authorized, or enabled by a federal agency, notwithstanding the contrary mandates of other applicable statutes. This view has sweeping implications, potentially impairing the ability of federal agencies to provide – and to provide in a timely manner – a wide variety of government services, benefits, and permits mandated under other laws. The ruling thus "has far-reaching effects on the scope of the Endangered Species Act" – if "the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* agency." *Defenders*, 450 F.3d at 398-99 and n.4, 401 (9th Cir. 2006) (Kozinski, J., dissenting (along with five other judges) from the denial of rehearing en banc) (Fed. App. 69a, 74a-79a, 82a).[3] *See* Sherry Bosse, *Defenders of Wildlife v. EPA: Testing the Boundaries of Federal Agency Power under the ESA*, 35 ENVTL. L. 1025, 1052 (2006) ("In

---

[3] Judge Kozinski also accurately describes that, because the Ninth Circuit has not "fixed the problems [of inconsistent case law and circuit conflicts] ourselves," this places the Ninth Circuit "in a highly precarious position vis a vis . . . the Supreme Court." 450 F.3d at 401 (Fed. App. 82a).

*Defenders*, the Ninth Circuit articulated a sweeping grant of additional authority to agencies to protect species under the ESA.").[4]

One need look no further than the existing, muddled body of decisions for illustrations of the variety of federal programs affected. ESA Section 7(a)(2) compliance issues often arise, for example, with respect to agency action being taken pursuant to a prior contract or permit that limits the agency's authority. Some appellate courts (including some Ninth Circuit panels) have found that ESA Section 7 does not override the limitations imposed by contract or permit and therefore does not apply.[5] In other decisions significant

---

[4] On the merits, the Bosse article rightly concludes that the "analytic approach the court used to arrive at this conclusion does not withstand scrutiny." *Id.*; *see id.* at 1039-58 (describing "several serious analytic missteps" in the Ninth Circuit's "critically flawed" interpretation of ESA Section 7(a)(2) and the implementing rule at 50 C.F.R. 402.03. More important at this stage, however, even those advocating a broad view of the role of Section 7 agree that "[q]uestions as to the proper meaning and interpretation of § 402.03 arise regularly in the courts." Jan Hasselman, *Holes in the Endangered Species Act Safety Net: The Role of Agency "Discretion" in Section 7 Consultation*, 25 STAN. ENVTL. L. J. 125, 179 (2006); *see id.* at 151-94 (discussing over 20 decisions and the "discordant case law").

[5] *E.g.*, *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) (ESA Section 10 incidental take statement and related contract were read not to include a duty to reinitiate ESA consultation upon the listing of a new species); *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995) (pre-ESA right-of-way agreement with Bureau of Land Management did not include the ability to alter rights-of-way to reduce impacts on listed species, so no ESA Section 7 consultation is required); *Platte River Whooping Crane Habitat Maintenance Trust v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27, 33-34 (D.C. Cir. 1992) (no ESA Section 7 duty to impose wildlife conditions on annual licenses for hydropower project).

for irrigated agriculture, however, Ninth Circuit panels have inconsistently found that ESA Section 7 essentially amends the terms of pre-ESA water contracts. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 2000); *O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1995).

Federal agencies often provide insurance, grants, or other forms of economic assistance or incentives pursuant to statutory directives. In such settings, some courts following the same reasoning as the Ninth Circuit below have found that ESA Section 7(a)(2) applies and imposes crosscutting constraints on the ability to provide that assistance. *Florida Key Deer v. Brown*, 386 F. Supp. 2d 1281, 1289-93 (S. D. Fla. 2005), *appeal pending*, No. 05-16374-II (11th Cir.) (ESA Section 7(a)(2) limits Federal Emergency Management Agency's flood insurance program). *Key Deer* and the decision below thus threaten to impair federal assistance under a broad array of programs – from social security to farm support to natural disaster response – because each act is subject to the procedural prerequisite of consultation and to the substantive limitations stated in ESA Section 7(a)(2).

Federal agencies also frequently have some permitting or certification role with regard to private or State actions. Several courts have found that ESA Section 7(a)(2) does not apply in a way that expands that role. *Strahan v. Linnon*, 967 F. Supp. 581, 607-08, 620-21 (D. Mass. 1997), *aff'd*, 187 F.3d 623 (table), 1998 WL 1085817 at *3 (1st Cir. 1998) (ESA Section 7 does not apply to Coast Guard certificates of documentation and inspection for ships, even though the ships can endanger whales and other listed marine species); *see Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985). The decisions of the Ninth Circuit below and in *Washington Toxics Coal. v. United States Envtl. Prot.*

*Agency*, 413 F.3d 1024 (9th Cir. 2005), are to the contrary. *See* pages 15-16 *infra*.

The issues raised here even have national security implications, largely because the Ninth Circuit's ruling reads ESA Section 7(a)(2) to overcome all other laws. The opinion below provides prospective plaintiffs with a potent precedent to delay military training exercises and the like until an often-lengthy consultation process is completed – and to preclude them altogether if the exercises would adversely modify critical habitat or jeopardize the continued existence of any ESA-listed species. *Compare Ground Zero for Non-Violent Action v. United States Dep't of Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004) (rejecting such a claim through an analysis that seems inconsistent with the reasoning of the panel below); Hasselman, *supra* note 4, at 161 (Earthjustice attorney questions *Ground Zero*).

In sum, the question of how ESA Section 7(a)(2) interrelates with a federal agency's organic laws already occurs with considerable frequency, and that frequency will certainly not abate in light of the ruling below. The Court should accept review to provide much-needed guidance on a recurring issue of great significance, especially as the lower courts have reached inconsistent results.

2. Both Petitions clearly establish that there are mature conflicts in the circuits (as well as conflicts within the Ninth Circuit)[6] on the relationship between ESA Section 7(a)(2)

---

[6] As Judge Kozinski wrote in dissenting from the rehearing denial, the panel's ruling "ignores six prior opinions of our own court" and is "precisely the kind of case we should take en banc to set our own house in order." *Defenders*, 450 F.3d at 394 (Fed. App. 69a); *see id.* at 400 (the "majority opinion squarely . . . conflicts with the Fifth and D.C. Circuits") (Fed. App. 79a). And as Judge

(continued....)

and an agency's organic laws. *See* Fed. Pet. at 19-20; NAHB Pet. at 11-18. As the Petitions develop, the panel opinion below conflicts with decisions of the Fifth and D.C. Circuits. *Am. Forest & Paper Ass'n v. United States Envtl. Prot. Agency*, 137 F.3d 291, 297-99 (5th Cir. 1998); *Platte River*, 962 F.2d at 34.

We would add that the panel's ruling is also at least in tension with decisions from three other circuits. They are: the First Circuit (*Strahan v. Linnon*, 187 F.3d 623 (table), 1998 WL 1085817 (1st Cir. 1998)), the Eighth Circuit (*In re Operation of the Missouri River Sys. Litig.*, 421 F.3d 618, 630-31 (8th Cir. 2005)), and the Tenth Circuit (*Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1127 (10th Cir. 2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004); *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512 (10th Cir. 1985)).[7] Moreover, the over 20 district court and circuit court opinions on the relationship between ESA Section 7(a)(2) and an agency's organic laws reflect that

---

(continued) . . .

Thompson described in his dissent from the panel opinion, the ruling is inconsistent with several Ninth Circuit decisions and statements. *Defenders*, 420 F.3d at 979-80 (Fed. App. 64a-65a).

[7] The panel asserted that its view of ESA Section 7(a)(2) is supported by decisions of the First and Eighth Circuits. 420 F.3d at 970 (Fed. App. 44a-46a), citing *Defenders of Wildlife v. United States Envtl. Prot. Agency*, 882 F.2d 1294, 1299 (8th Cir. 1989), and *Conservation Law Found. v. Andrus*, 623 F.2d 712, 715 (1st Cir. 1979). Amicus agrees with the Solicitor General's position that the Ninth Circuit's reliance on these decisions is unwarranted. Fed. Pet. at 20 n.7. Moreover, the cited Eighth Circuit opinion addressed only an ESA Section 9 "take" violation, 16 U.S.C. § 1538, not the scope of Section 7. 882 F.2d at 1300. More recently, the Eighth Circuit indicated its acceptance of the narrower view of ESA Section 7 in its *Missouri River System* opinion. 421 F.3d at 630-31.

"courts have been inconsistent" and there is "discordant case law." Hasselman, *supra* note 4, at 180, 193.

Accordingly, the Petitions clearly satisfy this Court's Rule 10(a) standard for accepting review. There is a conflict in the circuits on an important, recurring question of federal law.

3. The court below essentially read out of existence the longstanding formal regulation at 50 C.F.R. 402.03 – which provides that Section 7 applies only to the extent there is "discretionary Federal involvement or control." The panel majority twists 50 C.F.R. § 402.03 in a fashion contrary to the Services' own reading, contrary to the language of the rule, and contrary to the reading of other courts. *See* Fed. Pet. at 18; NAHB Pet. at 20-22; Bosse, *supra* page 4, at 1042-47. Thus, review is warranted because the decision below is contrary to this Court's precedents on the respective roles of federal agencies and the judiciary in construing regulations and on the degree of deference owned to agency statutory interpretations. *See Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (agency interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation'"); *United States v. Mead*, 533 U.S. 218 (2001); *Defenders*, 450 F.3d at 397-98 (9th Cir. 2006) (Kozinski, J., dissenting with five other judges) (Fed. App. 73a-74a); Fed. Pet. at 18.

4. Both Petitions encompass the question of whether the ruling below contravenes this Court's ruling in *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004), by concluding that EPA's approval of Arizona's CWA Section 402 permitting program is the legally relevant cause of impacts to endangered species directly caused by future privately initiated, state-permitted land use activities. *See* Fed. Pet. at 12-13; NAHB Pet. at i-ii, 24-29. This aspect of

the decision below does contravene a precedent of this Court and warrants review.[8]

The opinion below also is in tension with other precedents of this Court regarding causation. The Court construed ESA Section 9 liability to be limited by concepts of "proximate cause" in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697 n.9, 700 n.13, 709-14 (1995). Similar limits should be read into ESA Section 7 to avoid federalizing a wide variety of State and private actions.[9]

---

[8] *See id.*; *Defenders*, 450 F.3d at 394, 398-99 (Judge Kozinski's analysis of the inconsistency with *Public Citizen*) (Fed. App. at 69a, 76a-78a); Hasselman, *supra* note 4, at 193 and n.309 (*Public Citizen* "suggests the opposite outcome from the one reached by the *Defenders* majority. If the agency lacked authority under the CWA to deny a transfer application, then its decision would not be the 'cause' of any harm that resulted. The [*Defenders*] court did not explain this apparent contradiction.").

This Court's unanimous *Public Citizen* opinion reversed *Public Citizen v. Dep't of Transp.*, 316 F.3d 1002 (9th Cir. 2003). The Ninth Circuit does not seem to have acceded to the notion that but-for causation (*e.g.*, but for a mandatory federal permit, a privately initiated action could not occur) is not sufficient in many statutory settings.

[9] *See* Fed. Pet. at 11 ("Section 7(a)(2) thus does not impose upon federal agencies any affirmative duty to protect listed species from harms caused by other actors, such as a state permittee."). The ESA Section 7 causation issue has strong parallels to a significant causation issue under another ESA section. *Sweet Home* established a "proximate cause" limit on ESA Section 9 "take" liability. Despite this, a few lower courts have interpreted "take" broadly in a fashion making State and local governments liable for any "takes" committed by a private party whose actions are reviewed by a governmental agency for some non-ESA purpose. Law review commentary suggests such liability should not exist under a causation analysis. Jonathan Adler, *Judicial Federalism and the Future of Federal Environmental* Regulation, 90 IOWA L. REV. 377, 429-30 (2005);

(continued....)

This Court's precedents support that a governmental exercise of regulatory authority constrains, but does not "authorize," private land uses. Instead, the private property owner has the initial right to develop the property under Fifth Amendment jurisprudence. *E.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-17; Rasband, *supra* note 9, at 626. Additionally, this Court has found that partial federal funding and oversight of a State program do not federalize those State actions. *Forsham v. Harris*, 445 U.S. 169, 178-80 (1980); *United States v. Orleans*, 425 U.S. 807, 816-18 (1976). Similarly, the "mere fact that a business is subject to state regulation does not by itself convert its [private] action into that of the State for purposes of" State action under the Fourteenth Amendment. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). Those decisions embody the

---

(continued) . . .

James Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law About Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 ENVTL. L. 595, 623-28 (2003). Other law review articles explain why making a regulatory agency responsible for any " takes" committed in a privately initiated action cannot be reconciled with the structure of the ESA or with federalism principles in the Constitution. Valerie Brader, *Shell Games: Vicarious Liability of State and Local Governments for Insufficiently Protective Regulations Under the ESA*, 45 NAT. RESOURCES J. 103 (2005); J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, 16 NAT. RESOURCES & ENV'T 70 (ABA Fall 2001); Shannon Petersen, *Endangered Species in the Urban Jungle: How the ESA Will Reshape American Cities*, 19 STAN. ENVTL. L. J. 423, 438-54 (2000).

The Ninth Circuit's notion that a federal agency with certain limited permitting authority is a legally culpable cause of impacts directly caused by privately initiated projects has a substantial overlap with the "vicarious ESA liability" notion discussed in those articles. The Court's guidance could well resolve both pressing issues.

common sense principle that the person proposing and conducting the action is the legally relevant cause of that action's impacts, but more distant regulators (whose scope of authority is often limited) are not legally relevant causes.

The rationale of the court below on causation is in tension with those precedents. The Ninth Circuit's ruling makes EPA's transfer of CWA permitting authority the "cause" of all effects that may flow from future privately initiated actions that involve discharges requiring State NPDES permit authorization.[10] Yet, because ESA Section 7(a)(2) addresses only the impacts of federal actions (not State-approved private actions) and because CWA Section 402(b), 33 U.S.C. § 1342(b), limits EPA's legal authority, the answer should be that EPA is not the legal cause of the private impacts "the agency has no [CWA] authority to prevent." *Public Citizen*, 541 U.S. at 767; *see Am. Forest & Paper Ass'n*, 137 F.3d at 298-99; Fed. Pet. at 11-13; NAHB Pet. at 27-29.

In sum, the causation issue warrants review. The Ninth Circuit's ruling is at least in tension with Supreme Court authority, and the court's rationale conflicts with the Fifth Circuit's analysis in *Am. Forest & Paper Ass'n*, 137 F.3d at 298-99. Issues regarding who or what is the legally relevant cause of impacts for ESA Section 7 purposes, and on the

---

[10] Because the CWA only provides jurisdiction over water quality issues within waters of the United States, the CWA provides no authority for EPA to control private land uses on uplands (including farms) that may affect listed species. *See* Fed. Pet. at 4 note 1; *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1116-17 (9th Cir. 2000); *Natural Res. Def. Council v. United States Envtl. Prot. Agency*, 859 F.2d 156, 169-71 (D.C. Cir. 1988); *Save the Bay, Inc. v. United States Army Corps of Eng'rs*, 610 F.2d 322, 326 (5th Cir. 1980).

scope of impacts considered in assessing ESA Section 7 compliance, are recurring issues of considerable significance.

5. We urge the Court to grant the Petitions to relieve the adverse impacts that conflicting lower court precedents have on the broad spectrum of private individuals and businesses who rely on timely federal grants, permits, and services. The conflicting case law creates adverse impacts in the following areas.

First, the legal uncertainty spawned by the divergent lower court authorities creates economic inefficiencies. The absence of a clear rule invites greater litigation and produces arbitrarily disparate results.[11]

Delays are a second major area of adverse impacts. There are delays in delivering federal services if the ESA Section 7(a)(2) consultation process is needlessly engaged in the face of legal uncertainty, or if there is litigation challenging the alleged lack of ESA Section 7(a)(2) compliance. A timely federal check or permit can be the difference between survival and bankruptcy or closure for a farm or any other business.

A third set of adverse impacts is the inability to provide needed federal services or permits at all if a court – following one of several available lines of precedent – concludes that ESA Section 7(a)(2) is an overriding authority and that a particular federal action (although mandated under other laws) does not substantively comply with

---

[11] This, in turn, impairs public faith in the judicial system, which necessarily suffers where the perception is that any given judge or panel may simply select one or another line of precedents that suits its world view.

Section 7(a)(2). This may happen with greater frequency in the future under the ruling below and similar rulings. The ESA Section 7(a)(2) constraint against adversely modifying critical habitat has the potential to prevent many more federally assisted actions now that: (1) *millions of acres* have been designated as critical habitat for numerous species (*see* 50 C.F.R. §§ 17.95 and 17.96); and (2) some courts have held that adverse modification of critical habitat is subject to a more stringent "recovery"-based standard than is provided for in current rules.[12] To prevent unwarranted shutdowns of important federal programs under the Ninth Circuit's view of ESA Section 7(a)(2), the Court should accept review and provide guidance on when ESA Section 7(a)(2) does and does not apply.

6. A particularly pernicious effect of the Ninth Circuit's view of ESA Section 7 is that it thwarts the will of Congress as expressed in other statutes. In numerous statutes, Congress has directed a federal agency to do X (*e.g.*, issue a permit, grant money, provide insurance or compensation) if particular conditions are satisfied. The Ninth Circuit's view that ESA Section 7(a)(2) adds procedural prerequisites, and even may prohibit otherwise mandatory federal action, frustrates the legislative objectives of the other statutes.

---

[12] *E.g., Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059, 1069-77 (9th Cir. 2004). Further, some lower courts have found that federal agencies have a difficult burden in meeting the ESA Section 7(a)(2) duty to "insure" that a federal action is "not likely to jeopardize the continued existence of a" listed species. *Washington Toxics Coal.v. United States Dep't of Interior*, 2006 WL 2469119 at *17-28 (W.D. Wash. decided Aug. 24, 2006).

For example, the CWA has a federalism objective that States take the lead in regulating the water quality impacts of private land uses. 33 U.S.C. 1251(b); *Rapanos v. United States*, 126 S. Ct. 2208, 2215, 2223-24 (2006); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 166, 172-74 (2001). In the CWA, Congress did not condition the transfer of Section 402 permitting authority to States on any (continuing) federal role under ESA Section 7(a)(2). *See* NAHB Pet. at 3-4, 9-14. The Ninth Circuit's view, however, frustrates the CWA's federalism objective, as well as the similar ESA Section 6 objective (16 U.S.C. 1535) of voluntary State cooperation on ESA matters. *See* Fed. Pet. at 10-12.

7. America's producers of food and fiber have suffered particular harm resulting from the Ninth Circuit's view of ESA Section 7 as superseding all other laws. Earlier in 2005, another Ninth Circuit panel used similar rationales in *Washington Toxics Coal v. United States Envtl. Prot. Agency*,, 413 F.3d 1024 (9th Cir. 2005). There, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") specified the standards and procedures for temporarily suspending a pesticide use due to ESA concerns. 7 U.S.C. 136(l) and 136d(c). Nonetheless, the Ninth Circuit held that ESA Section 7(a)(2) overrode any such limitations on EPA's or the court's authority. 413 F.3d at 1031-35.

The result was that certain uses of pesticides to help produce food and fiber for the American public were banned by a court injunction. The injunction is inconsistent with the careful balancing of environmental and food production goals in FIFRA. This is but one example in which the same rationale expressed by the court below has had and will continue to have adverse effects on farming.

Phase two of the *Washington Toxics* saga has involved continuing litigation over the federal agency efforts to develop rational means of implementing these expansive Section 7 obligations in the context of pesticide approvals. After the first *Washington Toxics* case created the specter of many suits to limit uses of particular pesticides until lengthy ESA Section 7 consultation was completed, the responsible federal agencies sought to streamline the ESA Section 7 compliance process for pesticide registration. The agencies did so by adopting so-called ESA Section 7 counterpart rules. *See* 69 Fed. Reg. 47,732 (Aug. 5, 2004). One innovation under those rules was to eliminate the delay of obtaining U.S. Fish and Wildlife Service concurrence, in informal consultation under 50 C.F.R. § 402.13, when EPA alone concludes that a pesticide action is not likely to adversely affect (let alone jeopardize the existence of) a listed species.

This key innovation was recently struck down in *Washington Toxics Coal v. United States Dep't of Interior*, 2006 WL 2469119 (W.D. Wash. decided Aug. 24, 2006), *appeals pending*. Prominent in the district court's analysis was the Ninth Circuit's ruling below that ESA Section 7 requires consultation with the relevant Service as a prerequisite to any and all federal actions. The counterpart rules were found unlawful for eliminating this mandatory consultation for some subset of agency actions. *See* 2006 WL 2469119 at *13-14, quoting from *Defenders*, 420 F.3d at 961 (Fed. App. 26a).

Thus, the decision below is being interpreted in ways that impair the ability of American farmers to provide food and fiber to serve domestic and international needs. This further illustrates why, in light of the significant consequences of the Ninth Circuit's ruling to both the public

sector and the private sector, the ruling warrants review by this Court.

8. Accepting review would provide the Court with an opportunity to clarify that certain *dicta* in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (*"TVA v. Hill"*), do not control the scope of ESA Section 7(a)(2) *vis a vis* other statutory duties. That famous case involved the snail darter and the Tellico Dam. The tea leaves from the *TVA v. Hill* opinion have greatly influenced the treatment that ESA claims have received in the years since in lower courts. For example, many lower courts cite *TVA* as demanding substantive injunctions even for violations of ESA Section 7 procedures and as requiring that listed species receive the benefit of any doubt created by man's incomplete scientific knowledge. *E.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 792-800 (9th Cir. 2005); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1126-30 (9th Cir. 1998).

The panel below relied heavily on *TVA v. Hill* as supporting the conclusion that ESA Section 7(a)(2) overrides the limitations on an agency's authority as articulated in any other statute. 420 F.3d at 964-66 (Fed. App. 32a-38a). Yet, *TVA v. Hill* concerned the remedy for an admitted substantive violation of ESA Section 7, and Federal Petitioners did not contend that TVA lacked statutory authority to not close the dam gates. *See* 437 U.S. at 171-73, 193-95; Hasselman, *supra* note 4, at 137 ("The Supreme Court never specifically addressed the question of whether TVA had the 'discretion' to not finish the dam. Nor did such an argument play a prominent role in the briefing before the court.").

Further, *TVA v. Hill* addressed the special rule that the legislative intent of an appropriations act cannot override a

substantive statute like ESA Section 7. 437 U.S. at 189-93. *TVA v. Hill* did not address the issue here of what happens when two substantive statutes (CWA Section 402(b) and ESA Section 7(a)(2)) are in apparent conflict. *See* NAHB Pet. at 23. "*TVA*, which did not even consider whether section 7 allows agencies to go beyond their statutory authority to carry out purposes of the ESA, is hardly authority to the contrary." *Platte River*, 962 F.2d at 34 (D.C. Cir. 1992). It is "contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue was not presented." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 n.5 (1992).

*TVA v. Hill* does contain some conflicting *dicta*. This includes quotations supporting a legislative intent that ESA Section 7 operates only within the limits of an agency's other legal authorities:

> "The subsection requires...*agencies to use their authorities*...[to] take the necessary action that will not jeopardize the continued existence of listed species."... H.R. Rep. No. 93-412, p. 14 (1973).... [T]he House manager of the bill, Representative Dingell, provided an interpretation of the Conference bill... "[Section 7] substantially amplifie[s] the obligation of [federal agencies] to *take steps within their power* to carry out the purposes of this act...." 119 Cong. Rec. 42913 (1973).

437 U.S. at 182-84 (emphasis added). More generally, Amicus agrees with the Solicitor General's and NAHB's analyses that, when the history of ESA Section 7(a)(2) is examined thoroughly, it supports the view in 50 C.F.R. 402.03 that ESA Section 7(a)(2) is supplemental and

operates within the confines of an agency's authority under its organic laws. *See* Fed. Pet. at 13-18; NAHB Pet. at 16-18.

Thus, review should not be declined on the unpersuasive basis that *TVA v. Hill* settles the scope of ESA Section 7(a)(2), but rather should be granted to clarify the dicta of that decision.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ELLEN STEEN
*Counsel of Record*
THOMAS R. LUNDQUIST
KIRSTEN L. NATHANSON
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2500

*Attorneys for American Farm Bureau Federation*